Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1994

JEAN DEHAINAUT, as widow and representative of LEONARD DEHAINAUT, Deceased, PATRICK WEST, RAY BOZYCH, and RICHARD ANDREWSon behalf of themselves, and a class of others similarly situated,

Petitioners,

v.

FEDERICO PENA, SECRETARY, UNITED STATES DEPARTMENT OF TRANSPORTATION, JAMES B. BUSSEY, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION AND CONSTANCE NEWMAN, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the appellate court having found that petitioners' Complaint sufficently stated a *prima facie* Bill of Attainder violation for purposes of withstanding a Motion to Dismiss, improperly then affirmed dismissal of this count based on petitioners' failure to provide evidentiary support for this claim on appeal.

2. Whether the President has the authority to ignore or override validly promulgated laws enacted for the benefit of federal employees under the Civil Service Reform Act.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Jean Dehainaut et al. v. Federico Peña. et al.*, 32 F.3d 1066 (Seventh Circuit, 1994), and appears in Appendix A, B and C to this Petition. The unpublished District Court opinion is attached as Appendix D.

STATEMENT OF JURISDICTION

The judgment under review by the Seventh Circuit Court of Appeals was decided August 9, 1994. Plaintiff's Petition for Rehearing was denied September 28, 1994. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. United States Constitution, Article I Section 9, Clause 3:

> No Bill of Attainder or *ex post facto* law shall be passed.

2. 5 C.F.R. § 731.303:

> When a person is disqualified for any reason named in § 731.202, OPM, in its discretion, may deny that person examination for and appointment to a competitive position for a period of not more than 3 years from the date of determination of disqualification. On expiration of the period of debarment, the person who has been debarred may not be appointed to any position in the competitive service until his fitness for appointment has been redetermined by OPM.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

The plaintiffs claimed initial federal jurisdiction based on 28 U.S.C. §§ 1361, 2201 and 2202.

B. Facts of the Case

The petitioners are all former Air Traffic Control Specialists fired by the Federal Aviation Admmistration ("FAA") for alleged participation in the 1981 strike. At the time petitioners were terminated, the applicable statute, 5 U.S.C. § 7311, provided a bar to continued federal employment but set for striking federal workers no minimum or maximum period of debarment. However, a regulation did exist, 5 C.F.R. § 731.303, which provided the Office of Personnel Management ("OPM") discretion to deny employment to strikers for a period of not more than three (3) years from the date of disqualification. (App. 7a, 8a).[1]

This regulation further provided that, at the expiration of the three year period, OPM was to redetermine the suitability of the fired employee under procedure as defined by regulation on a case-by-case basis. *Id.*

During the first week of August, 1981, OPM Director Donald Devine announced his office's intention to apply the maximum three year debarment to members of plaintiffs' class. (App. 8a).

On December 9, 1981, President Ronald Reagan wrote to the Director of OPM, directing a modification of the debarment policy so as to allow reemployment of the controllers fired in

---

1. App. refers to Petitioner's attached Appendix.

positions outside of the FAA. This letter further confirmed the debarment policy as to reemployment within the FAA. (App. 8a-9a).

Subsequently, pursuant to the President's letter, OPM issued a memorandum removing the *per se* debarment as to the positions outside the FAA. (App. 9a-10a). Neither the President's letter nor the OPM memorandum suggested any extension or modification of the three year ban as to reemployment within the FAA.

Between the date of the OPM memorandum in January of 1982, and March of 1984, various members of plaintiffs' class inquired of OPM as to the date they would be deemed eligible for reemployment with the FAA. OPM responded it would be three years from the date of termination. (App. 10a).

However, in the wake of re-election years polls as to the manner in which the President had handled the strike situation, in March of 1984, the OPM Director issued a Bulletin reinterpreting the President's December 1981 letter by providing that

> the debarment period imposed by the President against reemployment of discharged controllers within the scope of the FAA is indefinite in duration and extends to positions in the FAA and closely related facilities.

(App. 11a).

This Bulletin was issued with an expiration date and, when it expired it was reissued as FPM Bulletin 731-9, which had an expiration date of October 20, 1986. *Id.*

At the expiration of the three year debarment period, the

OPM, in response to employment applications from various fired controllers, refused to perform suitability determinations in accordance to its own regulations, instead applying its *per se* indefinite debarment policy. *Id.*

Since the expiration of the latest OPM Bulletin announcing the indefinite debarment policy, the FAA has refused to process any applications for reemployment submitted by members of plaintiffs' class, instead referring the applicants to the President's letter or the expired Bulletin, which documents the FAA, treated– at the time relevant to the complaint – as still mandating an indefinite disbarment against petitioners' class. *Id.*

Count I of petitioners' complaint alleges, in addition to the above general allegations, that prior to the 1981 strike, there have been, since 1962, a total of at least 39 strikes by federal sector employees, including three work stoppages by air traffic controllers against the FAA. In none of these other instances had a *per se* indefinite policy against future federal employment been implemented. (App. 22a). The imposition of this policy to an identifiable class of persons, — *i.e.*, all those fired for participating in the 1981 strike — while not similarly punishing those involving in the other 39 strikes, thus created a Bill of Attainder, impermissible under Article I, Section 9 of the United States Constitution when analyzed under Supreme Court doctrine and the case law of this Circuit.

Count II alleges that, through modifying and increasing the maximum three year debarment period to one of indefinite duration, the defendants have in effect increased the penalty for a prior action, thereby violating the proscription against *ex post facto* laws contained in Article I, Section 9 of the Constitution. (App. 11a).

Count III alleges that, at the end of the three year debarment

period, the respondents were obliged by regulation to afford each member of petitioners' class applying for reemployment a suitability determination on a case-by-case basis, based on criteria as provided by the applicable regulations. In violation of petitioners' constitutional right to due process under the law, the respondents have denied and continue to deny petitioners the procedural provided by these regulations resulting in the deprivation of petitioners' right to pursue their profession. *Id.*

Count IV alleges that, by singling out petitioners' class for *per se* indefinite debarment, while at the same time finding individuals with records of far more serious offenses suitable for employment within the FAA, the respondents have denied petitioners their right to equal protection under the law. *Id.*

The respondents filed a Rule 12 (b) Motion to Dismiss for failure to state a cause of action which was ultimately granted by the trial court on September 29, 1993. On August 9, 1994, the Seventh Circuit Court of Appeals affirmed the trial court and on August 9, 1994 issued an amendment to its initial opinion. On September 28, 1994, the court denied petitioners' Petition for Reconsideration.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONERS WERE IMPROPERLY REQUIRED TO PROVIDE EVIDENTIARY SUPPORT FOR THE BILL OF ATTAINDER CLAIM IN OPPOSITION TO A MOTION TO DISMISS.

The District Court originally granted respondents' Motion to Dismiss Count I of petitioners' Complaint—alleging a violation of the constitutional prohibition on Bills of Attainder—on the

basis that the indefinite disbarment policy was an executive, not a legislative, action and thus the clause did not apply. (App. 13a).

The appellate court disagreed with this reasoning. It found precedent for the proposition that an agency policy implementing a presidential directive may be the functional equivalent of a legislative enactment for purposes of the Bill of Attainder clause in the case of *Rodriquez v. United States Parole Commission,* 594 F.2d 170 (7th Cir. 1979). *Id.*

In so doing, the court found it inconceivable that the authors of the Constitution would have inadvertently allowed the Executive Branch to "engage in the same tyrannical practices that had made the bill such an odious institution" *Joint Anti-Fascist Refugee Committee v. McGrath.* 341 U.S. 123, 143 (1950) (Black, J. concurring). *Id.*

The court, having thus invalidated the linchpin of the district judge's decision dismissing Count I, should have simply remanded the case for further consideration. Instead, the court gratuitously assumes the task of determining issues related to the Bill of Attainder claim that were never argued or decided below. Specifically, the court sets out to decide — in the first instance — whether the indefinite debarment policy constitutes "punishment" for purposes of the Bill of Attainder clause. (App. 14a).

The court enunciates a three pronged test for determination as to whether a particular enactment constitutes punishment derived from *Selective Service System v. Minnesota Public Interest Research,* 468 U.S. 841 (1984).

Using this test, the court finds that, indeed, the barring of designated individuals or groups from specified employment constitutes "punishment" and further finds that "plaintiffs

allegations fit comfortably within this description." Incredibly, though, the court still refuses to remand the case and states its intent to begin the dubious exercise of determining whether the debarment policy was the "product of punitive intent." (App. 15a).

This clearly goes well beyond the function of a court of review. By its own admission, the court has found that at least a *prima facie* violation of the Bill of Attainder Clause has been made. To further review whether punitive intent has been proven clearly either assumes that petitioners have already introduced evidence on this subject into the record or that they are under an obligation to introduce such evidence on appeal.

This, however, directly violates the well established standards governing Motions to Dismiss, *i.e.*, the court must accept all well pleaded facts as true, *Perkins v. Silverstein*, 939 F.2d 463 (7th Cir. 1991) and, in defending against a Motion to Dismiss, the plaintiff is under absolutely no obligation to provide evidentiary support for the allegations of the Complaint. *Scott v. O'Brady*, 760 F. Supp. 1288, *aff'd*, 975 F.2d 366 (7th Cir. 1991).

Indeed, the court makes it clear in its decision that it is requiring the appellate record as a whole to evince "unmistakable evidence of punitive intent" before it will reverse. (App. 16a). Yet, because this came before the court on the granting of a Motion to Dismiss, it is axiomatic that the "record as a whole" will consist of nothing more than bare pleadings. Where, one may legitimately ask, is this evidentiary record to be found?

The simple answer is nowhere. There is no administrative nor legislative record in the court file and, obviously, no testimony was taken on this issue. Impliedly conceding the evidentiary vacuum presented it, the court then takes the astonishing step of penalizing the petitioners for not having

somehow presented evidence on an issue that was never even addressed below. Indeed, the original decision unmistakably places the evidentiary burden on petitioners by concluding: "the evidence (plaintiffs) present constitutes far too thin a reed to form the basis of . . . punitive intent." *Id.*

It is telling that, upon review of petitioners' Petition for Reconsideration, the court revised this sentence to reflect that the administrative record" was insufflcient to form the basis of punitive intent. (App. 4a). Again, a review of the record and pleadings of the parties reveals no "administrative" nor any other record that would lead to the court's conclusions and the court conveniently neglects to cite to where this "record" was found.

In this case, it is beyond question that the appellate court first found that petitioners had pled a *prima facie* case of a Bill of Attainder violation, but then proceeded to try the evidentiary issues in the case. The petitioners lost this "trial" because they did not produce sufficient evidence to rebut an "administrative record" that did not exist. The court violated petitioners' basic due process rights to a fair attempt to prove their case and its decision must be reversed.

II.

THE APPELLATE COURT ERRED IN FINDING PRESIDENT REAGAN HAD THE AUTHORITY TO OVERRIDE THE CONTROLLING REGULATION LIMITING DEBARMENT TO NO LONGER THAN THREE YEARS.

Petitioners' complaint alleged the existence of a validly promulgated regulation—5 C.F.R § 731.303—which provided for a maximum period of debarment for striking federal employees of three years. The Complaint further alleged that the

indefinite debarment policy violated petitioners' due process right to a suitability determination for federal employment at the expiration of the three years as mandated by 5 C.F.R. § 731.303.

The appellate court agreed that the regulation in question did indeed mandate a maximum three year debarment but that the President had authority to issue a directive overriding the regulation (App. 20a).

The court found that the President's authority to do so in a statute never before argued by any party to extend such authority —5 U.S.C. § 3301—which states the President may

> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
>
> (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment, sought; and
>
> (3) appoint and prescribe the duties of individuals to make inquiries for the purposes of this section.

Id.

While the court declined to specify exactly which subsection it found controlling, it is clear that (3) has no relevance to this case and (2) deals with the exact suitability determinations the directive purported to withhold. Therefore, only (1) could have any bearing on the President's authority to debar a class of individuals from federal employment and it specifically delimits that authority to the promulgation of *regulations* — not

Presidential fiat. The Complaint, however, makes clear that whatever the Presidential letter of December 9, 1981 was, it was not a regulation. There was no notice or comment period nor any of the other procedural safeguards mandated by the Administrative Procedure Act. Thus 5 U.S.C. § 3301 is inapplicable to the facts of this case.

The court finds further authority in *Wagner v. Officer of Personnel Management,* 783 F.2d 1042 (Fed. Cir. 1986), *cert. denied,* 477 U.S. 906 (1986). A reading of *Wagner* will reveal, however, that it contains absolutely no analysis whatsoever for the President's ability to supersede the law, the Federal Circuit merely declares that the power to do so exists. The court also relies on *Korte v. Office of Personnel Management,* 797 F.2d 967 (Fed. Cir. 1986). *Korte* again gives the issue no independent analysis and relies for authority solely on *Wagner.* Perhaps beginning to realize the frailty of its position, the court next cites a case never before cited nor relied upon by any party, *American Federation of Gov't Employees v. Hoffman,* 543 F.2d 930 (D.C. Cir. 1976) *cert. denied,* 430 U.S. 965 (1977).

The *Hoffman* decision, though, is inopposite. The plaintiffs in *Hoffman* were challenging the statutory authority of the executive branch Civil Service Commission to enact certain *regulations* requiring federal personnel in army and air force reserve technician programs to maintain membership in the army and air force reserves. The *Hoffman* court explicitly premised its decision on the recent Supreme Court ruling in *Hampton v. Mon Sun Wong,* 426 U.S. 88, 86 S. Ct. 1895 (1976) which dealt with the Civil Service Commission's statutory authority to issue *regulations* barring non-citizens from federal employment. The government's defense in both cases rested on the broad authority given the President to issue regulations under 5 U.S.C. § 3301.

The respondents in the instant case have never argued and

could not argue that the indefinite debarment policy was promulgated by regulation. Indeed, implicit in the finding that the Presidential directive "superseded" the regulation is a finding that 5 C.F.R § 731.303 was the controlling law at the time of the events complained of by the petitioners. Therefore, the cases cited by the court in support of its decision are simply irrelevant.

In this case, a regulation tantamount to a statute existed which specifically applied to the petitioners in this action. In that situation, the only power the President had — short of promulgating a superseding regulation — was to see to it that the law was faithfully executed. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S. Ct. 863, 966 L. Ed. 1153 (1952).

If this court's opinion is allowed to stand, it is an open invitation to the partial or complete gutting of the civil service system at the President's discretion. There is no principled way to distinguish the President's right to "supersede" the regulation in question here from the right in the future to "supersede" regulations governing discovery or trial of Merit System Protection Board ("MPSB") appeals, or, if the Seventh Circuit is serious about the regulation in question being tantamount to a statute, to simply "supersede" one or all of the panoply of statutory rights granted federal employees under the Civil Service Reform Act.

CONCLUSION

For all the above mentioned reasons, a Writ of Certiorari should issue to review the judgment of the Court of Appeals in this matter.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED SEPTEMBER 28, 1994

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 28, 1994

HON. WILLIAM J. BAUER, Circuit Judge

HON. JOEL M. FLAUM, Circuit Judge

HON. ROBERT A. GRANT, District Judge*

No. 93-3649

JEAN DEHAINAUT, as widow and representative of LEONARD DEHAINAUT, Deceased, PATRICK WEST, RAY SOZYCH, et al.,

Plaintiffs-Appellants,

v.

FEDERICO PENA, Secretary, United States Department of Transportation, JAMES B. BUSSEY, Administrator, Federal Aviation Administration and CONSTANCE NEWMAN, Director, United States Office of Personnel Management,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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* The Honorable Robert A. Grant of the Northern District of Indiana is sitting by designation.

Appendix A

No. 91 C 7910

Wayne R. Andersen, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause on August 22, 1994, by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *in banc* be, and the same is hereby DENIED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AUGUST 29, 1994

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 29, 1994

HON. WILLIAM J. BAUER, Circuit Judge

HON. JOEL M. FLAUM, Circuit Judge

HON. ROBERT A. GRANT, District Judge*

No. 93-3649

JEAN DEHAINAUT, as widow and representative of LEONARD DEHAINAUT, Deceased, PATRICK WEST, RAY SOZYCH, et al.,

Plaintiffs-Appellants,

v.

FEDERICO PENA, Secretary, United States Department of Transportation, JAMES B. BUSSEY, Administrator, Federal Aviation Administration and CONSTANCE NEWMAN, Director, United States Office of Personnel Management,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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* The Honorable Robert A. Grant of the Northern District of Indiana is sitting by designation.

Appendix B

No. 91 C 7910

Wayne R. Andersen, Judge.

ORDER

The opinion issued in the above-entitled case on August 9, 1994 is hereby amended as follows:

On Page 8, last clause of sentence carried over from page 7 should read as follows:

(3) does the legislative (or, here, administrative) record evince an intent to punish? *Selective Service*, 468 U.S. at 852; *Nixon*, 433 U.S. at 473, 475-476.

On Page 9, first sentence of the last paragraph should read as follows:

Our final inquiry into whether the challenged enactment inflicts punishment is whether the legislative (or, here, administrative) record as a whole evinces an intent to punish: *See Nixon*, 433 U.S. at 478-484 (examining the terms of the enactment and related committee reports and legislative history to determine the issue of intent); *see also Selective Service*, 468 U.S. at 855 n.15 (same).

On Page 10, last sentence before subsection B. should read as follows:

Appendix B

We decline plaintiffs' invitation; the administrative record does not permit even a reasonable inference, let alone "unmistakable evidence," of punitive intent.[4] *See Nixon*, 433 U.S. at 484 (noting that an enactment may not be struck down "based upon inferences that we may be asked to draw from our personalized reading of the contemporary scene or recent history. In judging the constitutionality of the Act, we may only look to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or non existence of legitimate explanations for its apparent effect.").

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AUGUST 9, 1994

In the

United States Court of Appeals
For the Seventh Circuit

No. 93-3649

JEAN DEHAINAUT, et al.,

Plaintiffs-Appellants,

v.

FEDERICO PENA, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 91 C 7910-Wayne R. Andersen, Judge.

ARGUED APRIL 22, 1994—DECIDED AUGUST 9, 1994

Before BAUER and FLAUM, *Circuit Judges*, and GRANT, *District Judge*.*

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* The Honorable Robert A. Grant of the Northern District of Indiana is sitting by designation.

Appendix C

FLAUM, *Circuit Judge*. A group of former air traffic controllers who had been fired for their participation in a 1981 strike against the federal government filed a class action suit against the United States Department of Transportation ("DOT"), the Federal Aviation Administration ("FAA"), and the Office of Personnel Management ("OPM"), seeking mandamus and injunctive relief (including back pay) and a declaratory judgment that OPM's policy indefinitely barring them from employment with the FAA and related agencies was unconstitutional. In their four-count complaint, the plaintiffs alleged that the policy violated the Constitution as (1) a bill of attainder, (2) an *ex post facto* law, (3) a denial of due process, and (4) a denial of equal protection. The district court granted the defendants' motion to dismiss under Fed. R. Civ. P. 12(b). We affirm.

I.

This case has its genesis in the Professional Air Traffic Controllers Organization ("PATCO") strike of August, 1981. *See generally Professional Air Traffic Controllers Organization v. Federal Relations Authority*, 685 F.2d 547, 551 (D.C. Cir. 1982). At the time of the strike (and still today), a federal statute provided that "[a]n individual may not accept or hold a position in the Government of the United States" if he "participates in a strike, or asserts the right to strike against the Government of the United States." 5 U.S.C. § 7311. Though the statute was phrased in absolute terms, a regulation provided:

> When a person is disqualified for any reason named in § 731.202, OPM, in its discretion, may deny that person examination for and appointment to a competitive position for a

> period of not more than 3 years from the date of determination of disqualification. On expiration of the period of debarment, the person who has been debarred may not be appointed to any position in the competitive service until his fitness for appointment has been redetermined by OPM.

5 C.F.R. § 731.308. Among the many reasons for disqualification listed in 5 C.F.R. § 731.202(b) was "[a]ny statutory disqualification which makes the individual unfit for the service"—such as that provided by 5 U.S.C. § 7311.

On the first day of the strike, President Reagan issued an ultimatum to the striking controllers: return to work within forty-eight hours or forfeit your job. *See* 17 Weekly Comp. Pres. Doc. 845 (Aug. 3, 1981). Plaintiffs were among those discharged for failing to return to work. Shortly thereafter, the OPM announced that it intended to apply the maximum three-year debarment to the controllers. On December 9, 1981, however, President Reagan issued a directive modifying the debarment policy. The President's letter read as follows:

> The Office of Personnel Management has established the position that the former air traffic controllers who were discharged for participating in a strike against the government initiated on August 3, 1981 shall be debarred from federal employment for a period of three years. Upon deliberation I have concluded that such individuals, despite their strike participation, should be permitted to apply for federal employment outside the scope of their former employing agency.

Appendix C

Therefore, pursuant to my authority to regulate federal employment, I have determined that the Office of Personnel Management should permit federal agencies to receive applications for employment from these individuals and process them according to established civil service procedures. Your office should perform suitability determinations with respect to all such applicants according to established standards and procedures under 5 CFR, Part 731.

After reviewing reports from the Secretary of Transportation and the Administrator of the Federal Aviation Administration, I have further determined that it would be detrimental to the efficiency of operations at the Federal Aviation Administration and to the safe and effective performance of our national air traffic control system to permit the discharged air traffic controllers to return to employment with that agency. Therefore, these former federal employees should not be deemed suitable for employment with the Federal Aviation Administration.

I direct you to process their applications for reemployment with the federal government accordingly.

17 Weekly Comp. Pres. Doc. 1364 (Dec. 9, 1981). On January 6, 1982, OPM issued Federal Personnel Manual (FPM) Bulletin 731-6 which implemented the policy announced in the December presidential directive. Bulletin 731-6 stated in relevant part:

Appendix C

> All persons whose employment was terminated on account of the strike by air traffic controllers, which began on or about August 3, 1981, shall be determined not to be suitable for reinstatement or appointment in any position in the FAA, because it would be detrimental to the efficiency of that agency by interfacing with or preventing its effective performance of its duties and responsibilities (5 CFR 731.202(a)(2)).
>
> The Office of Personnel Management shall consider, on a case-by-case basis, applications for Federal employment, other than in the FAA from air traffic controllers whose employment was terminated on account of striking, and shall appropriate determinations of their suitability for the particular department for which they apply. . . .

Even after the issuance of Bulletin 731-6, plaintiffs allege that the FAA, in response to inquiries, continued to inform fired strikers that they still would be eligible for reemployment with the FAA three years after the date of their termination. This apparent contradiction was resolved, however, by the March 1984 publication of a new bulletin,[1] which, according to the plaintiffs, reinterpreted the December 1981 presidential directive in the wake of election-year polls indicating approval of the

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1. The new bulletin expired on January 20, 1985, at which time it was reissued (contents unchanged) as FPM Bulletin 731-9, with an expiration date of October 20, 1986.

President's handling of the PATCO strike. The new bulletin stated that "the debarment period imposed by the President against reemployment of discharged controllers within the scope of the FAA is *indefinite in duration* and extends to positions in the FAA *and closely related facilities*." (emphasis added).

After the three-year anniversary of their termination, the OPM received employment applications from various fired controllers, but declined to perform suitability determinations. Instead, the OPM applied the indefinite debarment policy articulated in the aforementioned FPM Bulletins. Plaintiffs filed suit, alleging that OPM's policy violated the Constitution as (1) a bill of attainder; (2) an *ex post facto* law; (3) a denial of due process; and (4) a denial of equal protection. In essence, plaintiffs claim that OPM misinterpreted and misapplied President Reagan's directive by failing to reevaluate the suitability for reemployment with the FAA at the end of the three-year maximum period of debarment.[2] The district court dismissed plaintiffs' complaint in its entirety, apparently under Fed. R. Civ. P. 12(b)(6).[3] Our review of a dismissal under Rule 12(b)(6) is *de novo*, *Northwest Tissue Center v. Shalala*, 1 F.3d 522, 527 (7th Cir. 1993), and we must accept as true all well-pleaded facts in the complaint and draw all reasonable inferences in the light most

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2. While President Clinton's lifting of the indefinite debarment policy has mooted plaintiffs' prayer for injunctive relief, their additional claims for back pay and attorney's fees remain before this court.

3. Defendants raised a number of arguments for dismissal, including lack of jurisdiction, *res judicata*, and failure to state a claim. The district court referred to the defendants' motion simply as a "Rule 12(b) motion", but did not find the suit barred by either jurisdictional defects or *res judicata*. Accordingly, we treat the dismissal as having been for failure to state a claim.

favorable to the plaintiffs. *Perkins v. Silverstein*, 939 F.2d 463, 466 (7th Cir. 1991). For the reasons stated below, we affirm the judgment of the district court.

II.

A.

Article I, § 9, clause 3 of the United States Constitution prohibits Congress from passing bills of attainder. The Supreme Court has defined a bill of attainder as "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Selective Service System v. Minnesota Public Interest Research*, 468 U.S. 841, 846-847 (1984); *see also Schellong v. I.N.S.*, 805 F.2d 655, 662 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987). Thus, it is apparent that a bill of attainder consists of three elements: (1) specification of the affected persons; (2) punishment; and (3) lack of a judicial trial.

As the Supreme Court has noted on numerous occasions, the Bill of Attainder Clause "is an important ingredient of the doctrine of separation of powers," *see e.g., United States v. Brown*, 381 U.S. 437, 442-443 (1965), that historically was viewed as a limitation on the power of the legislature alone. *See generally, Nixon v. Administrator of General Services*, 433 U.S. 425, 473-475 (1977); L. Tribe, *American Constitutional Law* 660 (1988). "Just as Art. III confines the Judiciary to the task of adjudicating concrete 'cases or controversies,' so too the Bill of Attainder Clause was found to 'reflect . . . the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.' " *Nixon*, 433 U.S. 469 (quoting *Brown*, 381 U.S. at 445). Thus, our first inquiry is whether the very nature of

the action challenged here—an executive agency's interpretation of a presidential directive—places it outside the reach of the ban on bills of attainder.

The district court thought so, concluding that the clause did not apply "[b]ecause OPM's indefinite disbarment policy is an executive action." Mem. Op. at 8 (citations omitted). Although the district court may be correct, the Supreme Court has not directly ruled either way on the applicability of the attainder ban to actions of executive and administrative agencies, and an argument can be made for analyzing each case functionally rather than structurally. *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 143 (1950) (Black, J., concurring) ("It is true that the classic bill of attainder was a condemnation by the legislature following investigations by that body, . . . while in the present case the Attorney General performed the official tasks. But I cannot believe that the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that had made the bill such an odious institution."). In *Rodriguez v. United States Parole Com'n*, 594 F.2d 170, 174 (7th Cir. 1979), we stated that an administrative rule adopted pursuant to Congressionally delegated authority must be viewed as tantamount to a statute for the purpose of determinating whether it runs afoul of the *ex post facto* clause, a constitutional provision that, like the ban on bills of attainder, protects settled expectations against subsequent shifts in political winds. Having gone this far, it is a conceivable step to also view an agency policy interpreting the language of a presidential directive issued pursuant to statutory authority, *see* 5 U.S.C. § 3301, as the functional equivalent of a legislative enactment for bill of attainder purposes. We need not decide today whether we ought to take such a step because assuming, without deciding, that the

clause applies to this case, we find that OPM's action is not "punishment" as that term has been defined in the context of bills of attainder.

In testing for bills of attainder, the Court has not applied a generic definition of the term "punishment". As Justice Frankfurter explained in *Lovett v. United States*:

> The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise might be enjoyed But there may be reasons other than punitive for such deprivation.

328 U.S. 303, 324 (1946) (Frankfurter, J., concurring). Thus, in view of the complexity inherent in characterizing governmental action and the multiple purposes of "punishment", the Court has employed a three-pronged test for determining whether a particular enactment inflicts punishment: (1) does it fall within the historical meaning of legislative punishment? (2) when viewed in terms of the type and severity of burdens imposed, can it reasonably be said to further nonpunitive legislative purposes? and (3) does the record evince an intent to punish? *Selectives Service*, 468 U.S. at 852; *Nixon*, 433 U.S. at 473, 475-476.

As the *Nixon* Court recognized, "[o]ur country's own experience with bills of attainder" has resulted in the addition of "a legislative enactment barring designated individuals or groups from participation in specified employments or vocations" to the list of historically impermissible punishments. 433 U.S. at 474

(citing *Cummings v. Missouri*, 4 Wall. 277 (1867); *United States v. Lovett*, 328 U.S. 304 (1946); *Brown, supra*) (parentheticals omitted). Because plaintiffs allegations fit comfortably within this description, we find the first prong of the test satisfied.

This is not nearly enough, however. Even where a fixed identifiable group—such as the fired controllers—is singled out and a burden traditionally associated with punishment—such as permanent exclusion from an occupation—is imposed, the enactment may pass scrutiny under bill of attainder analysis if its seeks to achieve legitimate and non-punitive ends and was not clearly the product of punitive intent. *See* Tribe, *supra*. at 654 n.13, 655 & 656 n.18. Put differently, "[t]he question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession." *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960) (Frankfurter, J.). In *DeVeau*, the Court upheld a New York statute which disqualified convicted felons from serving in any office in a waterfront labor organization, noting that the statute's purpose was "not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony." *Id.* Similarly, in *Schellong*, this court upheld two statutory provisions—one requiring that persons who participated in Nazi persecution be deported and the other eliminating the Attorney General's discretionary power to grant such persons relief from deportation—against a bill of attainder challenge. 805 F.2d at 662. We concluded that "[t]he purpose of these statutes is not to punish individuals for actions previously taken, but to ensure that

the United States is not a haven for individuals who assisted the Nazis in the brutal persecution and murder of millions of people." *Id.* Here, as in *DeVeau* and *Schellong*, President Reagan's directive, as interpreted and applied by OPM, was explained as a nonpunitive, prophylactic measure "to protect the efficiency of the FAA's operations" and "the safe and effective performance of the nation's air traffic control system." 17 Weekly Comp. Pres. Doc. 1364 (Dec. 9, 1981). A comparison of the instant case with *Cummings v. Missouri* illustrates this point. In *Cummings*, the Supreme Court struck down a provision of the post-Civil War Missouri Constitution that barred persons from certain professions unless they stated under oath that the never had been associated with the Confederacy. *See* 4 Wall. at 324-325. As the *Cummings* Court noted, the required oath had no connection to the determination of a person's qualifications for a particular profession. *Id.* at 319-320. Here, by contrast, we find an adequate nexus between the restriction imposed and the legitimate governmental purpose. President Reagan determined that the intermingling of controllers who had been fired for striking with those who had replaced them would interfere with the safety and efficiency of the FAA's operations.

Our final inquiry into whether the challenged enactment inflicts punishment is whether the record as a whole evinces an intent to punish. The Court has narrowly construed this prong of the test, requiring "unmistakable evidence of punitive intent" before an enactment may be invalidated on this basis. *Selective Service*, 468 U.S. 855 n.15; *Flemming v. Nestor*, 363 U.S. 603, 619 (1960). In *Selective Service*, for example, the Court found no punitive intent despite "several isolated statements" by legislators "expressing understandable indignation over the decision of some nonregistrants to show their defiance of the law." 468 U.S. at 855 n.15. Here plaintiffs draw upon public

opinion polls published early in 1984 showing voter approval of President Reagan's handling of the PATCO strike in support of their allegation that OPM's indefinite disbarment policy "worked a partisan political advantage for the President." Cmplt. ¶ 22. Of course, these polls cannot be evidence of punitive intent either on the part of President Reagan in issuing the directive or OPM in its initial implementation thereof because both events took place over two years prior to the release of the polling data. Plaintiffs ask this court to infer punitive intent from OPM's reinterpretation of the scope of the debarment policy—to include not only the FAA itself but also "closely related facilities"—"in the aftermath of the publication of said polls." We decline plaintiffs invitation; the evidence they present constitutes far too thin a reed to form the basis of even a reasonable inference, let alone "unmistakable evidence," of punitive intent.[4]

B.

Plaintiffs also submit that OPM's policy violated the *Ex Post Facto* Clause because it extended the debarment period from three years to an indefinite length after plaintiffs struck and were terminated for having done so. The *ex post facto* provision of the U.S. Constitution, Article I, § 9, clause 8, forbids Congress to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed." *Inglese v. United States Parole Com'n*, 768 F.2d 932, 934 (7th Cir. 1985) (citing *Weaver v. Graham*, 450 U.S. 24, 28 (1981)). As noted above, *supra* at 7, "regulations adopted by an agency pursuant to rule-

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4. Because we conclude that OPM's policy is not punishment under the Bill of Attainder Clause, we need not analyze whether the policy satisfies the third element of the test.

making authority delegated to it by Congress can 'have the force and effect of law' in the context of the *ex post facto* prohibitions." *Inglese*, 768 F.2d at 935 (citing *Rodriguez*, 594 F.2d at 173). In the circumstances presented here, however, we need not decide whether OPM's policy is tantamount to the United States Parole Commission rule at issue in *Rodriguez* (or whether the definition of punishment under the *Ex Post Facto* Clause is distinct from that under the Bill of Attainder Clause) because the policy would not violate the ban on *ex post facto* laws even if it did impose a new or additional sanction on plaintiffs. The sanction levied here—ineligibility for certain federal jobs—is civil, not criminal, and from "earliest times," the Supreme Court has construed the *ex post facto* provision to apply only to criminal laws. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (upholding the deportation of legally resident aliens because of their membership in the Communist Party, though that membership terminated before the enactment of a federal statute making such an affiliation a basis for deportation). As Justice Jackson explained,

> It has always been considered that that which [the *Ex Post Facto* Clause] forbids is penal legislation which imposes or increases criminal punishment for conduct lawful prior to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure. Both of these doctrine as original proposals might be debatable, but both have been considered closed for many years and a body of statute and decisional law has been built upon them.

Id. Plaintiffs reliance on *Rodriguez* is inapposite because that case clearly imposed a criminal sanction—the retroactive application of a Parole Commission rule setting parole hearings every eighteen months—on a prisoner serving only a two-year term, thereby depriving him of any meaningful opportunity for parole. *See* 594 F.2d at 173-175.

C.

Plaintiffs next claim that OPM's refusal to determine their suitability for reemployment with the FAA after the three-year maximum period of debarment violates their due process right to "pursue their professions." Cmplt. ¶ 32. They point to 5 C.F.R. § 731.303 as the source of the three-year limitation and allege that the presidential directive "did not suggest or direct that the debarment be extended beyond the maximum period set by regulation." Cmplt. ¶ 17. We disagree with both their characterization of the presidential directive and their conclusion that OPM failed to provide them with all the process that was due.

The Director of OPM has abroad discretion in interpreting a presidential directive relating to federal personnel matters. *Wagner v. Office of Personnel Management,* 783 F.2d 1042, 1045 (Fed. Cir.), *cert. denied,* 477 U.S. 906 (1986); *Kester v. Campbell,* 652 F.2d 13, 15 (9th Cir. 1981), *cert. denied,* 454 U.S. 1146 (1982). To be sustained the agency's interpretation must be "reasonable," meaning that it cannot be plainly erroneous or inconsistent with the President's order. *See Kester,* 652 F.2d at 15-16. In addition, "[a]n agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 852 (D.C. Cir.), *cert. denied,* 403 U.S. 923 (1971).

Appendix C

As we observed above, *supra* at 2, 5 U.S.C. § 7311 expressly bars from federal employment any person who strikes against the United States government. In our view, this statute, written without condition or limitation, contemplates an indefinite ban. Even if an existing regulation, such as 5 C.F.R. § 731.303, applies a more lenient policy than that allowed by statute, the President, acting under his statutory authority to regulate federal employment, *see e.g.*, 5 U.S.C. § 3301,[5] may issue a directive overriding that regulation. *See Korte v. Office of Personnel Management*, 797 F.2d 967, 970 (Fed. Cir. 1986); *American Federation of Gov't Emp. v. Hoffman*, 543 F.2d 930, 938 (D.C. Cir. 1976) ("Under 5 U.S.C. § 3301, Congress has delegated broad authority to the President to establish the qualifications and conditions of employment for civil servants within the executive branch."), *cert. denied*, 430 U.S. 965 (1977). Here the President did just that, and OPM's subsequent role was limited to executing the President's instructions.

In our view, OPM reasonably interpreted the language of the presidential directive to impose an indefinite ban upon the

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5. Pursuant to 5 U.S.C. § 3301, the President may:

> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
>
> (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and
>
> (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

employment of controllers removed for striking, not only from all FAA positions, but also from positions which interface with FAA. We note that our colleagues on the Federal Circuit have reached essentially the same conclusion on at least two occasions. *See Wagner,* 783 F.2d at 1044; *Meyer v. Office of Personnel Management,* 767 F.2d 868, 870 (Fed. Cir. 1985). Moreover, the fact that OPM appears to have determined the length of the ban (indefinite) prior to ruling on its breadth (the FAA *and all interfacing agencies*) does not undermine the reasonableness of its conclusions; in our view, both decisions flow naturally from the language of the President's order. The only remaining question is whether plaintiffs received the benefits of all of the due process protections to which they were entitled.

The Supreme Court has "never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause." *Lyng v. Payne,* 476 U.S. 926, 942 (1986). However, as this case presents somewhat of a hybrid situation in that plaintiffs once had the benefit (employment with the FAA) that they sought to regain, we find it at least arguable that plaintiffs have asserted a protected liberty or property interest. An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542 (1985) (citing *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950)). Assuming, again without deciding, that OPM's refusal to determine plaintiffs' suitability for employment with the FAA implicates a constitutionally protected interest, we find that a judicial determination of whether each plaintiff actually participated in the PATCO strike provided all the process that was due in this instance. The district court found that "[p]laintiffs, like Korte, were found to be strike participants through an adjudicative proceeding where they were

afforded 'safeguards of a judicial trial.' " Mem. Op. at 10 (citing *Korte,* 797 F.2d at 971). Plaintiffs do not argue otherwise. Once that determination was made, there was no need for further judicial or quasi-judicial proceedings because the presidential directive, as rationally interpreted by OPM, clearly, explicitly, and without exception imposed an indefinite ban on employment with the FAA and related agencies.

D.

Plaintiffs final contention is that they have been denied equal protection under OPM's indefinite debarment policy. In cases where a classification burdens neither a suspect group nor a fundamental interest, "courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws." *Gregory v. Ashcroft,* 111 S. Ct. 2395, 2406 (1991) (citations omitted). Here, because the right to government employment is not fundamental, *see Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313-314 (1976), and plaintiffs' status as discharged air traffic controllers does not place them in a suspect class, plaintiffs concede, as they must, that OPM's policy need only withstand rational basis review. Under this standard, a provision will not be overturned "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legislative purposes that we can only conclude that the [people's] actions were irrational." *Gregory,* 111 S. Ct. at 2406 (citations omitted).

The gravamen of plaintiffs' equal protection claim is that the policy is not rational because it denies to them the opportunity to undergo a suitability determination that was available to the thirty-eight previous classes of striking federal employees and would be available to convicted drug felons seeking federal employment. While plaintiffs description of the consequences of

OPM's policy may be factually correct, such a state of affairs does not necessarily make an enactment infirm under the Equal Protection Clause. As the relevant Supreme Court precedents make clear, the government need not "deal alike with all . . . classes, or to strike at all evils at the same time and in the same way;" *Semler v. Dental Examiners*, 294 U.S. 608 (1935), "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislative may think." *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). In our view, the explanations offered in the presidential directive advanced the legitimate governmental objectives of safety and efficiency in the administration of our nation's air traffic and suffice to rebut the claim that the policies enacted in furtherance of the directive are irrational.

III.

By imposing an indefinite period of debarment from employment with the FAA and related agencies, the Office of Personnel Management reasonably interpreted President Reagan's order regarding air traffic controllers who violated federal law by striking against the United States. OPM's policies implementing the presidential directive did not violate either the Bill of Attainder Clause or the *Ex Post Facto* Clause and also did not deny plaintiffs due process or equal protection of the law. Accordingly, the district court's dismissal of plaintiffs' complaint in its entirety is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D — MEMORANDUM, OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 7910

JUDGE WAYNE R. ANDERSEN

JEAN DEHAINAUT, as widow and representative of LEONARD DEHAINAUT, deceased, PATRICK WEST, RAY SOZYCH, and RICHARD ANDREWS, on behalf of themselves, and a class of others similarly situated,

Plaintiffs,

v.

FEDERICO PENA, Secretary, U.S. Department of Transportation, JAMES B. BUSSEY, Administrator, Federal Aviation Administration; CONSTANCE NEWMAN, Director, U.S. Office of Personnel Management,

Defendants.

MEMORANDUM, OPINION & ORDER

This case involves the claims of former air traffic controllers who were discharged by the Federal Aviation Administration (FAA) in 1981 because of their involvement in an illegal strike against the Government of the United States. This matter is before the court on the defendants' Rule 12(b) motion to dismiss plaintiffs' complaint. For the reasons stated below, the motion is granted and plaintiffs' complaint is dismissed with prejudice.

Appendix D

BACKGROUND

On August 3, 1981, after several months of unsuccessful efforts to reach an agreement with the FAA on a collective bargaining agreement, the Professional Air Traffic Controllers Organization ("PATCO") called on its members to strike. Over 70 percent of the nation's air traffic controllers answered the call, causing a significant disruption to private and commercial aviation in the United States. *Professional Air Traffic Controllers Organization v. Federal Relations Authority,* 685 F.2d 547, 551 (D.C. Cir. 1982).

On the first day of the strike, President Reagan issued an ultimatum to the striking air traffic controllers to return to work within 48 hours or forfeit their jobs. *See* 17 Weekly Comp. Pres. Doc. 845 (Aug. 3, 1981). Plaintiffs were among those discharged, pursuant to the procedures required by 5 U.S.C. §§ 7512-14, for failing to return to work.

Shortly after the strike, the Office of Personnel Management ("OPM") determined that the PATCO strikers would be debarred from any federal employment for three years. On December 9, 1981, President Reagan issued a directive to the Director of OPM stating that the discharged PATCO strikers "should not be deemed suitable for employment with the Federal Aviation Administration." 17 Weekly Comp. of Pres. Doc. 1364 (Dec. 9, 1981). OPM subsequently interpreted this directive as indefinitely barring the PATCO strikers from reemployment with the FAA and interfacing agencies. Based on that interpretation, OPM denied favorable suitability determinations for plaintiffs and the class they seek to represent.

Plaintiffs allege that OPM's interpretation of President

Reagan's directive is erroneous and that the maximum period of debarment is three years, that OPM is required to apply certain administrative procedures in reevaluating their suitability after that three year period expires, and that OPM's failure to follow those procedures is unconstitutional. Plaintiffs seek an order of mandamus directing the OPM to apply those administrative procedures for reassessing their suitability for reemployment with the FAA.

It is worth noting that President Clinton has announced that he had lifted the indefinite disbarment policy as to the PATCO strikers. Plaintiffs and the class they seek to represent are now free to apply for reemployment with the FAA. Because the President's action does not resolve completely the issues raised in plaintiffs' complaint, the court must consider whether it states a claim.

DISCUSSION

In considering a motion to dismiss, the court must accept as true all well-pleaded material facts in the complaint and must draw all reasonable inferences from those facts in the light most favorable to the plaintiffs. *Perkins v. Silverstein,* 939 F.2d 463, 466 (7th Cir. 1991). Further, the complaint should not be dismissed unless it appears, beyond a doubt, that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957).

Plaintiffs' complaint is not the first challenge to the indefinite disbarment policy. To the contrary, the claims presented here already have been squarely considered and rejected by the Federal Circuit. *See Wagner v. Office of Personnel Management,* 783 F.2d 1042 (Fed. Cir.), *cert. denied,* 477 U.S.

906 (1986); *Korte v. Office of Personnel Management*, 797 F.2d 967 (Fed. Cir. 1986). Indeed, plaintiffs seek to represent a class that is virtually indistinguishable from the class certified in *Wagner* — that is, all PATCO strikers who were denied favorable suitability determinations by OPM after their discharge. *Wagner*, 783 F.2d at 1044.

To avoid the effect of *Korte*, plaintiffs argue that the Federal Circuit had no jurisdiction to consider the constitutionality of the indefinite disbarment policy. Plaintiffs fail to recognize that it is this court, not the Federal Circuit, which has limited jurisdiction over these types of controversies. The Civil Service Reform Act of 1978 provides the exclusive remedy for federal employees with nonconstitutional employment-related claims and constitutional claims seeking monetary relief. *See, e.g., Bush v. Lucas*, 462 U.S. 367, 388-90 (1983); *Arakawa v. Reagan*, 666 F. Supp. 254, 258-60 (D.D.C. 1987). This court's jurisdiction, on the other hand, is only over constitutional claims seeking injunctive relief and is concurrent with the MSPB's jurisdiction. *Arakawa*, 666 F. Supp. at 259-60. Accordingly, plaintiffs' arguments concerning the appropriateness of jurisdiction in *Korte* are not well founded.

For that reason, plaintiffs' Motion to Supplement the Pleadings filed on September 9, 1993 is beside the point. Under *Arkawa* federal courts share concurrent jurisdiction with the MSPB over constitutional claims for injunctive relief. Whether the defendants have argued that proposition in the past is irrelevant.

Turning to the merits, the factual predicate of plaintiffs' complaint was squarely rejected in *Wagner*. The gravamen of plaintiffs' complaint is that the debarment period is not indefinite

but is limited to three years. Plaintiffs point to 5 C.F.R. § 731.303 as the source of the three year limitation and allege that the presidential directive "did not suggest or direct that the debarment be extended beyond the maximum period set by regulation." (Cmplt. ¶ 17.)

The Presidential directive, which plaintiffs have attached to their complaint, first states that President Reagan had concluded that the PATCO strikers "despite their strike participation, should be permitted to apply for federal employment outside the scope of their former employing agency." It continues:

> I have further determined that it would be detrimental to the efficiency of operations at the Federal Aviation Administration and to the safe and effective performance of our nations air traffic control system to permit the discharged air traffic controllers to return to employment with that agency. Therefore, these former federal employees should not be deemed suitable for employment with the Federal Aviation Administration.

Finding it "difficult to imagine more precise or explicit language," the *Wagner* court upheld OPM's interpretation of the directive over plaintiffs' interpretation: "The Presidential directive explicitly imposed an indefinite ban upon the employment of striking controllers by the Administration." *Wagner,* 783 F.2d at 1044. It further held that the indefinite disbarment policy was expressly authorized under 5 U.S.C. § 7311: "Congress meant exactly what it said — that persons who participated in a strike against the government are barred indefinitely from employment in the government." *Wagner,* 783 F.2d at 1046.

Appendix D

The *Korte* court held that if 5 C.F.R. § 731.303 placed a three-year limit on the disbarment policy, it was "superseded" by the Presidential directive. *Korte,* 797 F.2d at 970. The Federal Circuit found Korte's argument, like plaintiffs' argument here, that "OPM's action was contrary to its own regulation" to be "beside the point." *Id.* The court emphasized:

> OPM was not acting on its own authority and exercising its own discretion; rather it was acting under the express direction of the President. Even assuming, arguendo, that the indefinite statutory bar was limited to three years by the regulation, the President's directive overrode or superseded that regulation and imposed an indefinite ban on the class of which Korte was a member. As the government properly argues, OPM's role in the suitability determination was limited to executing the President's instructions.

Id.

Plaintiffs suggest that their case is different from *Wagner* and *Korte* because only they have alleged that the indefinite disbarment policy "had worked a partisan political advantage for the President." (Cmplt. ¶ 22.) However, this general allegation of political partisanship is irrelevant for two reasons. First, the complaint notably does not allege that President Reagan's motivation in issuing his directive — which orders the indefinite disbarment — was partisan political advantage. Rather, the complaint alleges simply that polls taken two years later showed voter approval of the President's actions in dealing with the PATCO strikers.

Second, the complaint fails to allege that the indefinite disbarment policy had any connection to the political affiliation, political candidacy, or political beliefs of the PATCO strikers. *See Correa v. Fischer,* 982 F.2d 931, 934-35 (5th Cir. 1993). Without that causal connection, plaintiffs' blanket invocation of partisan politics is without merit.

With respect to the individual counts of plaintiffs' complaint, Federal Circuit already has considered and ruled adversely to plaintiffs on each of them.

Count I

Plaintiffs claim the OPM has violated the Bill of Attainder Clause by applying the indefinite disbarment policy to the PATCO strikers and not to participants of federal strikes that occurred prior to the 1981 PATCO strike.

In *Korte,* the Federal Circuit found that the indefinite disbarment policy was not a violation of the Bill of Attainder Clause for two reasons. First, a bill of attainder is "a law that legislatively decides guilt and inflicts punishment upon an indentifiable individual without provision of the protections of a judicial trial." *Korte,* 797 F.2d at 972 (*quoting Selective Service v. Minnesota Public Interest Research Group,* 468 U.S. 841, 846-47 (1984)). Neither OPM's indefinite disbarment policy nor the Presidential directive establishes "guilt." As *Korte* makes clear, "guilt" was established upon a finding that plaintiffs participated in the PATCO strike, a finding that plaintiffs do not contest here. Once plaintiffs were determined to be PATCO strike participants, they were necessarily subject to the indefinite disbarment policy.

Second, the Bill of Attainder Clause "is a limitation on the authority of the legislative branch." *Korte,* 797 F.2d at 972 (*citing*

United States v. Brown, 381 U.S. 437, 442 (1965)). Because OPM's indefinite disbarment policy is an executive action, the clause does not apply here. *Korte*, 797 F.2d at 972.

Count II

Plaintiffs argue that because the period of disbarment was changed from a period of three years to an indefinite period after their strike participation and termination, the policy is an *ex post facto* law.

This issue was also disposed of by the Federal Circuit in *Korte*:

> [W]e note that even if the President's directive imposed a new or additional sanction, the directive would not violate the constitutional proscription against *ex post facto* laws. The sanction imposed is civil, not criminal, and from "earliest times," the Supreme Court has construed the *ex post facto* provision to apply only to criminal laws. *Harrisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952).

Korte, 797 F.2d at 972.

Count III

Plaintiffs claim that OPM's failure to follow its regulations and apply certain administrative procedures to determine their suitability after the three year maximum period of disbarment violates their due process right to "pursue their profession." (Cmplt. ¶ 35.)

Appendix D

As discussed above, the disbarment period was indefinite and that OPM's role in determining the suitability of the PATCO strikers was limited to executing the President's instructions. For those reasons, the Federal Circuit rejected Korte's due process challenge. In *Korte,* the court assumed that a constitutionally protected liberty or property interest was implicated and terminated but held that Korte was afforded "the essential requirements of due process." *Korte,* 797 F.2d at 971 (*quoting Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985)).

In reaching that conclusion, the court emphasized that OPM did not have to apply certain procedures before finding him unsuitable:

> [O]nce it was determined that Korte was removed from his air traffic controller position for strike participation, "there was no need for further investigation and the President's directive was then controlling. This court has held that the Presidential directive "explicitly imposed an indefinite ban upon the employment of striking controllers by the [FAA]." *Wagner,* 783 F.2d at 1044.

Id. Likewise, this court rejects plaintiffs' due process challenge. Plaintiffs, like Korte, were found to be strike participants through an adjudicative proceeding where they were afforded "the safeguards of a judicial trial." *Korte,* 797 F.2d at 971.

Count IV

Finally, plaintiffs claim that they have been denied equal

protection under OPM's indefinite disbarment policy. They contend that the policy has no rational basis because it applies only to the PATCO strikers and not to convicted drug dealers and other felons.

As a preliminary matter, plaintiffs correctly perceive that the indefinite disbarment policy is subject to review under the rational basis test, not strict scrutiny. The right to government employment is not fundamental, *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313-14 (1976), and plaintiffs' status as discharged air traffic controllers do not place them in a suspect class.

However, the Federal Circuit has found a rational basis for the indefinite disbarment policy. *Korte,* 797 F.2d at 971-72. The court observed that the indefinite disbarment policy is "authorized" under 5 U.S.C. § 7311, the statute which makes it a crime to strike against the government. *Id.*

In a memorandum opinion, the Supreme Court has affirmed a judgment that 5 U.S.C. § 7311 is constitutionally sound. *United Federation of Postal Clerks v. Blount,* 404 U.S. 802, *aff'g,* 325 F. Supp. 879 (D.D.C. 1971). Under the statute, a person who participates in a strike against the United States "may not accept or hold a position" with the United States Government. The *Wagner* court found the "unambiguous" statute to mean "that persons who participated in a strike against the government are barred indefinitely from employment in the government." *Wagner,* 783 F.2d at 1046. The *Korte* court added that "it is not irrational or arbitrary for the government to prohibit reemployment of discharged employees who participated in a strike against the government." *Korte,* 797 F.2d at 970.

Appendix D

The *Korte* court found that the President's stated rationale for the indefinite disbarment policy — that permitting discharged controllers to return to the FAA would be detrimental both to the efficiency of the FAA's operations and to the safe and effective performance of the nation's air traffic control system — was rationally related to the statutory bar. *Korte*, 797 F.2d at 971-72. This court agrees.

CONCLUSION

For the foregoing reasons, plaintiffs' complaint is dismissed with prejudice.

ENTERED:

s/ Wayne R. Andersen
Wayne R. Andersen
United States District Judge

DATE: SEP 29 1993